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No. 98-1750

Supreme Court, U.S.
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In The

Supreme Court of the United States

DUANE KALEY, PORTAGE COUNTY SHERIFF, et al.,

Petitioners,

v.

PATTI L. GALLO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The principle of absolute immunity, which harbors the integrity and autonomy of the judicial system, is well ensconced in the common law tradition and must be preserved and protected by this U.S. Supreme Court. Judges and their agents, who execute judicial orders, are protected by absolute judicial immunity in order to minimize interference and intimidation. The actions of judicial agents cannot be reviewed for the purpose of determining the constitutionality of the political subdivision's policies and procedures. Once an actor is afforded absolute judicial immunity, the inquiry must cease. Continued inquisition into the individual's conduct defeats the purpose of absolute judicial immunity, and the judicial system will no longer operate with independence and without fear of consequences.

(1) Whether there can be any further inquiry into the actions of a County Deputy Sheriff, who has been afforded absolute judicial immunity while acting as an agent of a Domestic Court Judge, for the purpose of considering the constitutionality of the political subdivision's policies and practices?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner, Duane W. Kaley, is the duly elected Portage County Sheriff, and was a Defendant-Appellant in the U.S. District Court, Northern Division Ohio, Eastern District and the U.S. Court of Appeals for the Sixth Circuit.

Petitioners, Charles Keiper, Christopher Smeiles, and Kathleen Chandler[1] are the duly elected Board of Commissioners for Portage County, Ohio and were Defendants-Appellants in the U.S. District Court, Northern Division Ohio, Eastern District and the U.S. Court of Appeals for the Sixth Circuit.

Petitioner, Keith Jirousek, and John Doe #1 and #2 are duly appointed Portage County Sheriff's Deputies, and were Defendants in the U.S. District Court, Northern Division Ohio, Eastern District and were not parties to the appeal in the U.S. Court of Appeals for the Sixth Circuit.

Respondent, Patricia Gallo, while removing personal possessions from the marital residence and accompanied by a County Sheriff's Deputy pursuant to an order of the Portage County Common Pleas Court, Domestic Relations Division, was shot by her estranged husband, Richard Gallo[2]. Ms. Gallo was a Plaintiff-Appellee in the U.S.

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[1] Kathleen Chandler, Portage County Commissioner, was elected to a four year term beginning January, 1997, and replaced Commissioner Jack Groselle.

[2] Richard Gallo, while a Defendant at the District Court level, has never entered an appearance in this case and was not a party to any appeal, nor is he a party to this Petition.

LIST OF ALL PARTIES TO THE PROCEEDING – Continued

District Court, Northern Division Ohio, Eastern District and the U.S. Court of Appeals for the Sixth Circuit.

Respondents, Lauren Mary Gallo and Richard Tyler Gallo, are the Children of Richard and Patricia Gallo, and were Plaintiffs-Appellees in the U.S. District Court, Northern Division Ohio, Eastern District and the U.S. Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Portage County Sheriff and the Portage County Board of Commissioners respectfully request that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit in order to preserve judicial absolute immunity – a doctrine of exceptional importance.

OPINIONS BELOW

Four unreported opinions are located in the appendix:

Appendix A: United States District Court, Northern District of Ohio, Eastern Division, *Patti L. Gallo, et al., v. Duane Kaley, Portage County Sheriff, et al.*, Case No. 5:96 CV 1688, Final Order Unreported.

Appendix B: United States Court of Appeals for the Sixth Circuit, *Patti L. Gallo, et al., v. Duane Kaley, Portage County Sheriff, et al.*, Case No. 97-0400, Order Unreported.

Appendix C: United States Court of Appeals for the Sixth Circuit, *Patti L. Gallo, Mother and Next Friend of Lauren Mary Gallo and Richard Tyler Gallo v. Duane Kaley, Portage County Sheriff; Charles Keiper; Christopher Smeiles; Kathleen Chandler; Keith Jirousek*, Case No. 97-4034, Order Unreported.

Appendix D: United States Court of Appeals for the Sixth Circuit, *Patti L. Gallo, Mother and Next Friend of Lauren Mary Gallo and Richard Tyler Gallo v. Duane Kaley, Portage County Sheriff; Charles Keiper; Christopher Smeiles;*

Kathleen Chandler; Keith Jirousek, Case No. 97-4034, Denial of Petition for Rehearing En Banc Unreported.

BASIS FOR FEDERAL JURISDICTION

A. In the District Court and the U.S. Sixth Circuit

Petitioners filed a Notice of Removal requesting that the action be removed from Common Pleas Court to Federal District Court pursuant to 28 U.S.C. Section 1441 and 1446. The United States District Court for the Northern District of Ohio, Eastern Division invoked jurisdiction pursuant to 28 U.S.C. Section 1331 and 1343(a)(3), because Respondents' sought judgment against Petitioners pursuant to 42 U.S.C. section 1983, and attorneys' fees pursuant to 42 U.S.C. Section 1988.

B. In the United States Supreme Court

On January 26, 1999, the Sixth Circuit Court of Appeals issued a panel decision affirming the judgment of the District Court for the Northern District, Eastern Division. On April 1, 1999, the Sixth Circuit Court of Appeals denied the Petition for Rehearing En Banc. The jurisdiction of the United States Supreme Court is invoked pursuant to Title 28 U.S.C. Section 1254(1), on grounds that cases in the courts of appeals may be reviewed by this Court by Writ of Certiorari upon a party's petition.

STATUTORY PROVISION

TITLE 42 U.S.C. SECTION 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On March 22, 1996, Patti Gallo, herein the Respondent, filed a Complaint for Divorce in the Portage County Common Pleas Court, Domestic Relations Division, Case No. 96 DR 207. The Domestic Relations Court issued an ex parte Temporary Restraining Order (TRO) ordering the Portage County Deputy Sheriff to accompany Ms. Gallo while she removed her clothing and personal affects from the marital residence.

Deputy Keith Jirousek accompanied Ms. Gallo to the marital residence. Also present were Ms. Gallo's brother-in-law, her father, a counselor from the local battered women's shelter, Mr. Gallo, and insurance investigators. A fire had severely damaged the home days before this

occurrence. While examining the home and its contents, Mr. Gallo shot Ms. Gallo and then shot himself.

On July 9, 1996, Ms. Gallo filed her Complaint against Portage County, the Portage County Sheriff, his deputy, and the Portage County Board of Commissioners, herein the Petitioners, alleging a Federal Section 1983 claim in the Summit County Court of Common Pleas. On August 2, 1996, the Petitioners filed a Notice of Removal to the Federal District Court.

The Petitioners then filed an Answer on August 7, 1996, and a Motion to Dismiss on the basis of Absolute Immunity on January 3, 1997. On August 8, 1997, the United States District Court for the Northern District of Ohio, Eastern Division, concluded that the TRO required the deputy "to be present and to act as would a reasonable deputy in the same circumstances and with the same knowledge," and found that Deputy Jirousek acted within the scope of this order. [Appendix A] Accordingly, the court granted Deputy Jirousek's Motion to Dismiss on grounds of judicial immunity. The District Court also found that, "No matter what can be said regarding the Deputy's conduct, he certainly attempted to lend support to Ms. Gallo so that she could safely visit her home. The Deputy did so as an arm of the court and with quasi-judicial immunity. . . . " [Appendix A]

The District Court then found that, "[e]ven though the Deputy is immune from suit, the court is free to consider the Deputy's actions insofar as they shed light on the constitutionality of the governmental Defendant's alleged policies and practices. Simply put, the Deputy's

immunity from suit has no impact on the liability of the Defendant's." [Appendix A]

The Petitioners filed a timely appeal on September 5, 1997. The Respondents' request for permission to appeal Deputy Jirousek's dismissal was denied by the District Court on December 10, 1997. [Appendix B] The parties filed their briefs and oral arguments were heard in the United States Court of Appeals for the Sixth Circuit on January 25, 1999.

Affirming the District Court, the Sixth Circuit Court of Appeals ruled from the bench following oral argument without a written opinion pursuant to Sixth Cir. App. R. 36. [Appendix C] Subsequently, the Petitioners' requested a Rehearing En Banc on grounds that the panel decision conflicted with a decision of the United States Court of Appeals for the Sixth Circuit: *Johnson v. Turner;* and that the proceeding involved a question of exceptional importance deserving en banc consideration: the protection of the judicial immunity doctrine. The appellate court summarily denied the Petition for a Rehearing En Banc on April 1, 1999. [Appendix D]

REASONS FOR GRANTING THE WRIT

A. Inquiry into the actions of a County Deputy Sheriff, who has been afforded absolute judicial immunity while acting as the agent of a Domestic Relations Court Judge for the purpose of considering the constitutionality of the political subdivision's policies and practices, erodes the purpose and foundation of absolute judicial immunity.

It is crucial that the basis of common law *Judicial Absolute Immunity* be reviewed and affirmed by the United States Supreme Court. Common law absolute judicial immunity harbors the integrity and autonomy of the judicial system, and is an age-old tradition that must be preserved and protected by this Court. It is imperative that judicial decisions are made and carried out with minimal interference in order that judges, and their agents, not be subjected to intimidation and harassment. *Harlow v. Fitzgerald* (1978), 435 U.S. 800, 73 L. Ed. 2d 396. Petitioners respectfully submit that the U.S. District Court, Northern District, Eastern Division (District Court) and the U.S. Sixth Circuit Court of Appeals (Sixth Circuit Court of Appeals) have misconstrued this principle when rendering its decision.

Permitting inquiry into the actions of one who is cloaked with absolute judicial immunity is inconsistent with the principle of absolute judicial immunity, which requires minimal interference with the judicial process in order to shield that process from intimidation and harassment. *Harlow v. Fitzgerald* (1978), 435 U.S. 800, 73 L. Ed. 2d 396.

In order to reach the County policies as the proximate cause of an alleged constitutional injury, there must first be a determination that the actions of the deputy violated the constitutional rights of a plaintiff. *Collins v. City of Harker, TX.* (1992), 503 U.S. 115, 117 L. Ed. 2d 261, 1066. Inquiry into an individual's conduct is the only way to determine if such a constitutional detriment has occurred. Then and only then does the issue become whether or not the County's custom or policy was the proximate cause of the constitutional injury. *Id. See also, Oklahoma City v. Tuttle* (1985), 471 U.S. 808, 85 L. Ed. 2d 791; *St. Louis v. Praprotnick* (1988), 485 U.S. 112, 99 L. Ed. 2d 107.

Judicial absolute immunity cannot tolerate inquiry into the actions of an individual who has been cloaked with such immunity. Before entering an order in volatile situations, the court would have to balance municipal exposure with the need for the court's aid. This risk places an undue burden on the judiciary and interferes with judicial decisions in crucial "controversies sufficiently intense to erupt." *Briscoe v. LaHue* (1983), 460 U.S. 325, 75 L. Ed. 2d 96, 108. Requiring a Domestic Court to risk exposing a county when issuing an order subjects that judge to the harassment and intimidation that absolute judicial immunity sought to avoid. *Id.* Accordingly, the preservation of absolute judicial immunity precludes inquiry into the actions of a sheriff's deputy when executing a court order, and it is this essential element of absolute judicial immunity that must be preserved.

The analysis of a Sec. 1983 claim requires the determination that the actions of a state actor have caused a constitutional injury. *Collins v. City of Harker, TX.* (1992),

503 U.S. 115, 117 L. Ed. 2d 261, 1066. Then and only then will the custom or policy, as a causal link between the individual action and the violation, produce municipal liability. *Pembaur v. City of Cincinnati* (1986), 475 U.S. 469, 89 L. Ed. 2d 452. The integrity of absolute judicial immunity requires that, once granted absolute judicial immunity, there be no inquisition into the individual deputy's conduct. Any custom or policy of the Sheriff or County is, therefore, "quite beside the point," *City of Los Angeles v. Heller* (1986), 475 U.S. 796.

An erosion of absolute judicial immunity will result from allowing inquiry into the deputy's conduct. There would be no difference between absolute judicial immunity and qualified immunity if an individual's conduct can be scrutinized. With qualified immunity, although the individual is immune from claims, the individual's conduct is reviewed to establish a constitutional injury and then further investigation into a custom and policy is permitted. This Court's affirmation in the instant case results in the erosion of judicial absolute immunity because the consequences are the same as for qualified immunity; i.e., absolute judicial immunity having been granted, there remains the investigation into individual conduct to determine if custom or policy authorized such conduct.

The distinction between absolute judicial immunity and qualified immunity must be maintained. This differentiation is found in the common law history of each doctrine and the policy rationale behind each. *Cf. Owen v. City of Independence* (1980), 445 U.S. 622, 63 L. Ed. 2d 673; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* (1993), 507 U.S. 163, 122 L. Ed. 2d 517. To

allow absolute judicial immunity to be treated the same as qualified immunity, and thus make the consequence of each identical, erodes the purpose of absolute judicial immunity and ultimately weakens the judicial process. Judicial actions and proceedings will be undermined by the constant undertone of municipal liability.

The Sixth Circuit has already adopted this standard in *Johnson v. Turner*, 125 F.3d 324 (6th Cir. 1997), *reh'g and reh'g en banc denied*, October 22, 1997. The Sixth Circuit Court of Appeals held that a court's written memorandum – establishing a procedure for the arrest of putative fathers in child support and paternity matters – was a judicial decision to which judicial immunity applied, and not a policy of the county government to which liability for a 1983 action could attach. *Id.* at 335-336. In *Johnson*, the plaintiffs challenged the constitutionality of Tennessee paternity and child support statutes, and the procedures by which the Shelby County, Tennessee government and Shelby County Juvenile Court enforced those statutes. *Id.* at 326. The Plaintiffs claimed that the statute and its enforcement violated their Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. *Id.* The defendants included the county government and the county sheriff who had apparently arrested plaintiffs. *Id.* The district court granted judgment for all of the defendants, and the Sixth Circuit Court of Appeals affirmed. *Id.* at 339.

This Sixth Circuit held that the Shelby County Juvenile Court had jurisdiction over proceedings to establish paternity and obtain child support. Obviously, because the judge's actions were within the scope of his jurisdiction, he was immune from the plaintiffs' suit for money

damages under the doctrine of absolute judicial immunity. *Johnson, supra,* at 327, 333. This Court then extended that immunity to the court referees and employees, noting that, "one who acts as the judge's designee, and who carries out a function for which the judge is immune, is likewise protected." *Id.* at 333. The Sixth Circuit went even further and held that the Shelby County Government and County Sheriff were not liable for the alleged 1983 cause of action because the memorandum issued by the judge was a judicial order with which the county government could not have interfered. *Id.* at 335-336. The Court thereby authorized the county sheriff to arrest certain individuals. Yet neither the Sheriff nor the County were amendable to suit because the sheriff's actions were pursuant to the court's decisions and policy, not the County's!

The case at bar is legally identical. Here, the Respondents filed a Federal Section 1983 Claim against the Portage County Sheriff and its Commissioners. The action arose as the result of a court order issued by the Domestic Relations Court of the Portage County Court of Common Pleas. The order directed a deputy sheriff to accompany the Plaintiff as she entered the marital home to remove her clothing and personal affects.

As in *Johnson*, there can be no inquiry into the actions of individuals once they are granted judicial immunity; and thus, no liability can attach to the Sheriff or the Board of County Commissioners. The United States District Court for the Northern District of Ohio, Eastern Division, found that the deputy was acting as an arm of the Domestic Relations Court, which issued the order, and

was therefore entitled to absolute judicial immunity. In fact, because the lower court found that the deputy did not act outside of the scope of the order, the court effectively gave the deputy absolute judicial immunity not just for his presence, *but for his actions.*

The Sixth Circuit's affirmation of the District Court's Order in this matter is a disintegration of absolute judicial immunity. If inquiry can be made into the conduct of an individual who has been given absolute judicial immunity, then that immunity becomes nothing more than qualified immunity and the rationale behind judicial absolute immunity is undermined. There is a clear common law distinction between the two types of immunity that must be preserved.

CONCLUSION

Petitioners respectfully request that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit in order to preserve judicial absolute immunity – a doctrine of exceptional importance.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

PATTI L. GALLO, et al.,

Plaintiffs,

vs

DUANE KALEY, PORTAGE COUNTY SHERIFF, et al.,

Defendants

CASE NO. 5:96 CV 1688

Judge Sam H. Bell

ORDER

(Filed 8/8/97)

Presently pending before the court is the motion of Defendants Portage County Sheriff Duane Kaley, Portage County Deputy Sheriff Keith Jirousek, the Portage County Board of Commissioners, and Commissioners Jack Groselle, Charles Keiper, and Christopher Smeiles to dismiss Plaintiffs' multiple count complaint pursuant to Federal Rule of Civil Procedure 12(c) for failure to state a claim upon which relief can be granted. Defendants' motion is based upon a defense of absolute immunity. Plaintiffs have responded to Defendants' motion, Defendants have replied, and Plaintiffs have filed a supplemental memorandum in opposition. The issue is now ripe for determination.

In considering a motion for judgment on the pleadings, the court must view the facts presented in the

pleadings and the inferences to be drawn from them in the light most favorable to the nonmoving party. *Beal v. Missouri Pac. R.R. Corp.*, 312 U.S. 45, 50 (1941); *United States v. Moriarty*, 8 F.3d 329 (6th Cir. 1993); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1368 at 517-20 (1990). The motion must be granted if no material issues of fact exist and the moving part [sic] is entitled to judgment as a matter of law. *Moriarty*, 8 F.3d at 332. Using these guidelines, the court will scrutinize the complaint to determine whether it states a viable cause of action.

Statement of the Case

On March 16, 1996, Plaintiffs Patti Gallo and her two children fled their marital home after several episodes of physical, sexual, and emotional abuse by Patti Gallo's husband, Richard Gallo. (Complaint ¶ 10-12.) Patti Gallo instituted divorce proceedings and was granted a Temporary Restraining Order (TRO) enjoining Richard Gallo from verbally or physically abusing her or her children. (Complaint, ¶ 13-14; Exhibit B.) The TRO contained the following clause:

> IT IS THE FURTHER ORDER OF THIS COURT that plaintiff [Patti Gallo] be permitted to enter the martial [sic] home to be accompanied by a Deputy Sheriff to remove her clothing, personal effects as well as the clothing and personal effects for the children and documents necessary to present to the Court at the Temporary Hearing.

(Exhibit B, at 2.) On the day the TRO was issued, the home was burned. Richard Gallo was seen behaving

strangely near the home shortly after the fire. (Complaint ¶ 17.)

Immediately thereafter Patti Gallo told several Sheriff's Department employees that she believed that her husband had started the fire. (Complaint ¶ 16.) She further informed the Sheriff's department of prior threats by her husband which she now had reason to believe he might carry out. (Complaint ¶ 16.)

Before she entered the home with the Deputy Sheriff, Patti Gallo was assured by the Sheriff's Department that she would be protected from her husband. (Complaint ¶ 19.) On the morning of March 26, 1996, Patty Gallo and Defendant Deputy Sheriff Jirousek entered her home in accordance with the Temporary Restraining Order. (Complaint ¶ 20.) While Patti Gallo was in the bathroom located off the master bedroom Deputy Sheriff Jirousek waited in the hallway. (Complaint ¶ 21-22.) Richard Gallo entered the master bathroom, pulled a handgun from his jacket, shot Patti Gallo in the head, and then turned the gun on himself. (Complaint ¶ 21.) Mrs. Gallo survived the attack, but suffered permanent physical and emotional injuries. (Complaint ¶¶ 23-24.)

Plaintiffs now bring equal protection and due process claims under 42 U.S.C. § 1983, as well as a variety of tort claims against Defendants. Defendants have moved to dismiss those actions pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, claiming quasi-judicial immunity. (Docket # 17.)

Law and Analysis

The common law has long provided absolute immunity from liability for all persons who are integral parts of the judicial process. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). Put another way, judges and other court officers working in both the state and federal systems enjoy absolute judicial immunity from suit based on claims arising out of the performance of judicial or quasi-judicial functions. *Id.* at 344; *Pierson v. Rav*, 386 U.S. 547, 553-54 (1967); *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988). Courts take a functional approach when deciding whether a particular official or class of officials should be granted immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994); *Sparks v. Character and Fitness Committee of Kentucky*, 859 F.2d 428, 432 (6th Cir. 1988), *cert. denied*, 489 U.S. 10 11 (1989); *Valdez v. City and County of Denver*, 878 F.2d 1285, 1287 (10th Cir. 1989). Under the functional approach, the court "examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted and [the court] seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219 (1988). When judicial immunity is extended to officials other than judges, it is because, in the court's estimation, they "exercise a discretionary judgment" as part of their function. *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976); *Antoine v. Byers*, 508 U.S. 429 (1993).

While law enforcement officers are usually only entitled to qualified immunity, most circuits which have applied the Supreme Court's functional approach have held that absolute quasi-judicial immunity extends to

those who carry out the orders of a judge. *See Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981) ("Immunity which derives from judicial immunity may extend to persons other than a judge where performance of judicial acts or activity as an official aide of the judge is involved."); *Henry v. Farmer*, 808 F.2d 1228, 1238 (7th Cir. 1986) ("Non-judicial officers whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct."); *Coverdell v. Department of Soc. & Health Servs.*, 834 F.2d 758, 764-65 (9th Cir. 1987) (child protective services worker who faithfully executes valid court order to remove newborn infant from hospital and place in temporary shelter is absolutely immune from liability for damages in civil rights action challenging conduct authorized by the order); *Fowler v. Alexander*, 478 F.2d 694, 695-696 (4th Cir. 1973) (affirming trial court's finding of immunity for sheriff and jailer who executed a court order); *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980) ("Judicial immunity extends as well to those who carry out the orders of a judge."); *Tymiak v. Omodt*, 676 F.2d 306, 308 (8th Cir. 1982) (county sheriff who evicted plaintiff pursuant to state court order held to be immune.); *Roland v. Phillips*, 19 F.3d 552, 555 (11th Cir. 1994) (reversing denial of summary judgment for county sheriff and deputy sheriff claiming quasi-judicial absolute immunity). Indeed, the Sixth Circuit held in *Bush v. Rauch* that "[q]uasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." 38 F.3d 842, 847 (6th Cir. 1994); *see also Wholesale Elect. & Supply, Inc. v. Robusky*, 22 Ohio St. 2d 181

(1970). In a case in which four police officers were sued for following a municipal judge's order to arrest and incarcerate a court spectator, the Tenth Circuit explicitly declined to apply the less protective qualified immunity, ruling that only the grant of absolute immunity would sufficiently protect the judicial process from insubstantial claims. *Valdez v. City & County of Denver*, 878 F.2d 1285, 1288 (10th Cir. 1989).

The instant case presents the question of whether a deputy sheriff is entitled to quasi-judicial absolute immunity when, pursuant to a court order, he accompanied a victim of spousal abuse to the marital home where, despite the deputy's presence, the victim's husband inflicted serious harm upon her. In their Memorandum in Support of Motion to Dismiss, Defendants point to the great weight of authority which instructs that officials involved in the judicial process must be granted absolute immunity from suit in order to protect them from litigation intended to intimidate and harass. (Docket # 17, at 3.) Defendants reason that, in the instant case, because Deputy Jirousek was present in the home by virrue [sic] of a judicially ordered temporary restraining order, he was acting as an arm of the court which issued the order, and is thus entitled to quasi-judicial absolute immunity. (Docket # 17, at 8.)

Plaintiffs do not appear to contest the fact that the Deputy was acting as an arm of the court when he accompanied Ms. Gallo to the marital home, and indeed, Plaintiffs seem to acknowledge that the Deputy is entitled to quasi-judicial immunity regarding those actions which were in conformity with the order. Plaintiffs allege, however, that the Deputy did not comply with the order and

thus the cloak of quasi-judicial immunity does not shield his actions. Specifically, Plaintiffs oppose the Defendants' motion to dismiss, because in their view there is a material issue of fact regarding the extent of Deputy Jirousek's responsibilities under the state court order. (Plaintiffs' Memorandum, (docket # 19), at 5-7.) Plaintiffs claim that the state court order contained an implied duty to protect Ms. Gallo, and that Deputy Jirousek obviously failed to comply with that order. (Docket # 19, at 1-2; *see* state court order's relevant language *supra*.) Defendants disagree, arguing that in order to comply with the Judge's TRO, Deputy Jirousek merely had to accompany Plaintiff Patti Gallo to the marital home. (Docket # 17, at 10.) Plaintiffs maintain that resolution of this issue is crucial to a determination of whether absolute immunity is applicable. (Docket # 19, at 7.)

Ultimately, Plaintiffs allege that the Deputy's actions fell outside the scope of the state court order, and thus those actions are not protected by the umbrella of quasi-judicial immunity. According to Plaintiffs, the manner in which Deputy Jirousek attempted to carry out the order opens him to liability. In support of this idea, Plaintiffs cite to cases which involve defendants who were alleged to have taken affirmative unconstitutional actions beyond the scope of the judicial order which they were attempting to carry out. The two most relevant cases for our analysis are *Martin v. Board of County Comm'rs of the County of Pueblo*, 909 F.2d 402 (10th Cir. 1990) and *Sharp v. Kelsey*, 981 F.Supp. 1115 (W.D.Mich. 1996). In *Martin*, the plaintiff brought an excessive force claim against police officers who, in order to arrest the plaintiff, deliberately disregarded her physicians' vocal warnings that to move

her would expose her to a risk of paralysis. *Martin*, 909 F.2d at 404. The court granted qualified immunity rather than quasi-judicial absolute immunity to the police officers because, "Insofar as [the police officers] exceeded legal bounds in executing the warrant for arrest. [they] have a fortiori violated the very judicial order under which they seek the shelter of absolute immunity." *Id.* at 405.

In *Sharp*, police officers allegedly committed a series of batteries on a woman in the process of taking her into custody in accordance with a judicial order. *Sharp*, 918 F.Supp. at 1118-19. The court cited *Martin* approvingly, holding that the officers were entitled to quasi-judicial absolute immunity only for the fact of the execution of the order. *Id.* at 1121 (citing *Martin*, 909 F.2d at 405). The manner in which the officers carried out the order would be subject to the less-protective qualified immunity doctrine.[1] *Sharp*, 918 F.Supp. at 1211.

The Plaintiffs in the instant case do not allege the sort of affirmative wrongdoing with which the *Martin* and *Sharp* defendants were charged, but rather ask the court to find that Deputy Jirousek's failure to live up to the duty of protection implied in the state court order places him outside the boundaries of that order and, therefore,

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[1] The *Sharp* court explained that qualified immunity "extends to 'government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Sharp*, 918 F.Supp. at 1211 (quoting *Harlow*, 457 U.S. at 818).

quasi-judicial immunity should not protect him from liability.

The court agrees that a deputy's actions could fall outside the scope of a court order and therefore, strip him of the quasi-judicial immunity, and so it is for this court to interpret the order issued by the state court and to evaluate whether the Deputy's conduct was in conformance therewith. Contrary to the opinion expressed by the Plaintiffs in their briefs, this court believes that the interpretation of judicial opinions and orders such as the state court TRO in this case, is a question of law for the court rather than one of fact for a jury.

Again, the relevant language in the state court order read as follows:

> IT IS THE FURTHER ORDER OF THIS COURT that plaintiff [Patti Gallo] be permitted to enter the martial [sic] home to be accompanied by a Deputy Sheriff to remove her clothing, personal effects as well as the clothing and personal effects for the children and documents necessary to present to the Court at the Temporary Hearing.

(Exhibit B. at 2.) On its face, the provision requires no more than the presence of a Deputy Sheriff during Patti Gallo's visit to the marital home. However, the provision was not written in a vacuum. Rather, it is part of TRO which prohibited Patti Gallo's husband from coming near her or harming her or her children. It is clear that the judge who issues the order intended that Ms. Gallo be able to make a single visit to her home, in her husband's presence, without harm befalling her. The scope of the

order is thus broader than Defendants would admit. But how broad is the protection required by the order?

In measuring the breadth of the order this court concludes that the state court TRO required the Deputy to be present and to act as would a reasonable deputy in the same circumstances and with the same knowledge as was possessed by Deputy Jirousek. Now the question becomes whether the Deputy's conduct fell so far outside the terms of the court order that quasi-judicial immunity did not attach.

The Sixth Circuit has held that even negligent conduct by an official performing a judicial function (which conduct is necessarily not in conformity with the order) does not strip that official of his or her judicial immunity. *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988) (court officer was found to be immune from suit despite having erroneously issued a meritless arrest warrant). As mentioned above, another district court in this Circuit has held that the use of excessive force would strip that official of his immunity. *See Sharp*, 981 F.Supp. 1115. This court agrees that the facts alleged in *Sharp* should not support a claim of immunity, but now it must be determined if this Deputy's alleged failure to act in conformity with the court order was more like the intentional blows inflicted by those court personnel, or the negligent officer in *Foster*.

The court concludes that Deputy Jirousek's alleged actions pursuant to the court order are much more like those negligent acts of officials regarding whom the Sixth Circuit has held immunity to be appropriate. Deputy Jirousek did Ms. Gallo no intentional harm and did not

purposefully flaunt the order of the court. *C.f. King v. Love*, 766 F.2d 962, 968 (6th Cir. 1985) ("the act of deliberately misleading officers who are to execute a warrant about the identity of the person sought" is not a function normally performed by a judge and does not trigger immunity). No matter what can be said regarding the Deputy's conduct, he certainly attempted to lend support to Ms. Gallo so that she could safely visit her home. The Deputy did so as an arm of the court and with quasi-judicial immunity attaching to any non-intentional shortcomings. Therefore, Deputy Jirousek's motion to dismiss is granted.

Next, Defendants argue that once the court concludes that Deputy Jirousek is entitled to immunity, "Plaintiffs' claims against [the Portage County Sheriff and the Portage County Board of Commissioners] dissipate." (Defendant's Reply, at 7.) The court cannot share this view. First of all, Plaintiffs' claims against the Sheriff are based on policies and practices which do not depend upon the liability of his Deputy. Similarly, Plaintiffs' state law claims are substantively different from those alleged against Deputy Jirousek, for example: failure to train employees and failure to adopt appropriate domestic violence policies; these claims too, are not implicated by the Deputy Sheriff's immunity. Finally, Defendants argue that a finding of immunity on Plaintiffs' § 1983 claim for Deputy Jirousek would compel a similar finding on behalf of the other Defendants. Defendants base this defense on an Eighth Circuit case in which the Court held that because the defendant police officer in that case had not violated the plaintiffs' constitutional rights, the plaintiff's could not advance successful claims against the

defendant city on theories that the officer's conduct was the product of inadequate training. *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1012 (1992). While this court agrees that *Gregory* states the law correctly it fails to note its relevance to the instant Case.

The *Gregory* court addressed the substance of the claims against an individual officer, and finding the officer's conduct constitutional, concluded that any city policy or custom which produced that conduct would also be constitutional. The defendant city was, therefore, entitled to judgment. In the instant case, the court is not addressing the substance of the constitutional claim against the Deputy, but rather is considering whether he is entitled to immunity in which case the court need not subject his actions to constitutional scrutiny. Even though the Deputy is immune from suit, the court is free to consider the Deputy's actions insofar as they shed light on the constitutionality of the governmental Defendants' alleged policies and practices. Simply put, the Deputy's immunity from suit has no impact on the liability of the other Defendants.

Finally, in their reply brief, Defendants make reference to the Supreme Court's landmark decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989), in which the court elaborated on the extent of the government's duty to protect individual members of society. In their initial motion the Defendants did not raise *DeShaney* as a means to attack the substance of the Plaintiffs' claim, and the court does not understand Defendants to have improperly raised this additional challenge in their reply brief. Rather, the court presumes that Defendants reference was intended

to help define the outer limits of "their special relationship" with Ms. Gallo, and thereby help define the contours of the duty of protection prescribed by the state court order. The substance of Plaintiffs' constitutional claims is thus not before the court.

Conclusion

Because Deputy Jirousek was performing a judicial function when Ms. Gallo was injured by her husband and because the Deputy's conduct did not take him outside the umbrella of immunity offered by the state court order, he is entitled to quasi-judicial immunity for his actions. The Deputy's motion to dismiss is granted. The motion of the other Defendants is denied. (Docket # 17.)

IT IS SO ORDERED.

s _____
Sam H. Bell
United States District Judge

APPENDIX B

97-0400

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATTI L. GALLO, Mother and next friend of Lauren Mary Gallo and Richard Tyler Gallo,

Petitioners,

(Filed 12/10/97)

v.

DUANE KALEY, Portage County Sheriff, CHARLES KEIPER; CHRISTOPHER SMEILES; KATHLEEN CHANDLER;

KEITH JIROUSEK,

Respondent.

Before: BOGGS, MOORE, and FARRIS Circuit Judges.

The plaintiffs, Patti Gallo and her minor children, filed an action against Mrs. Gallo's former husband, the Portage County Sheriff, a deputy sheriff, and members of the Portage County Board of Commissioners, alleging equal protection and due process claims under § 1983, as well as various state tort claims. The county defendants moved to dismiss the action, asserting the claims were barred by quasi-judicial immunity. The district court granted the motion with respect to Deputy Jirousek, but

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* The Honorable Jerome Farris, Circuit Judge for the United States Court of Appeals Ninth Circuit, sitting by designation.

denied dismissal of the claims of the other county defendants. Those defendants appealed the ruling, and their appeal is pending as Case No. 97-4034. The district court certified its dismissal of the claims against Jirousek for interlocutory review under 28 U.S.C. § 1292(b). The plaintiffs now petition this court for permission to appeal. The county defendants oppose the petition.

To obtain permission to appeal the movant must show that: (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292; see *Cardwell v. Chesapeake & Ohio Ry.*, 504 F.2d 444, 446 (6th Cir. 1974). Review under § 1292(b) should be sparingly granted and then only in exceptional cases. *Kraus v. Board of County Road Com'rs for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966). The plaintiffs have not demonstrated that this appeal raises a controlling issue of law for which there is a substantial grounds for a difference of opinion as to the correctness of the district court's ruling.

It therefore is ORDERED that the petition for permission to appeal is denied.

ENTERED BY ORDER OF THE COURT

s

Clerk

APPENDIX C

Case No: 97-4034

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

PATTI L. GALLO, Mother
and next Friend and
Richard Tyler Gallo

Plaintiff-Appellee

(Filed 1/26/99)

v.

DUANE KALEY, Portage
County Sheriff; CHARLES
KEIPER; CHRISTOPHER
SMEILES; KATHLEEN
CHANDLER;

Defendants-Appellants

BEFORE: RYAN and GILMAN, Circuit Judges; SARGUS*, District Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court,

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* The Honorable Edmund A. Sargus, United States District Judge for the Southern District of Ohio, sitting by designation.

and it is therefore ORDERED that said judgment be and it hereby is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s

Leonard Green, Clerk

APPENDIX D

97-4034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATTI L. GALLO, MOTHER AND NEXT FRIEND OF LAUREN MARY GALLO AND RICHARD TYLER GALLO,

(Filed 4/1/99)

Plaintiff-Appellee,

v.

DUANE KALEY, ET AL.,

Defendant-Appellants,

KEITH JIROUSEK,

Defendant.

BEFORE: RYAN and GILMAN, Circuit Judges; and SARGUS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Edmund A Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s

Leonard Green, Clerk